No. 82-1246

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IN THE

Supreme Court of the United States

October Term, 1982

BOSE CORPORATION,

Petitioner,

against

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL N. POLLET
MARSHALL BEIL
CAROL A. SCHRAGER
KARPATKIN POLLET PERLMUTTER & BEIL
Attorneys for Respondent
708 Third Avenue
New York, New York 10017
(212) 557-4700

QUESTION PRESENTED

Whether the Court of Appeals was correct in undertaking the independent review of the record mandated by numerous decisions of this Court and reversing the judgment in favor of a conceded public-figure plaintiff against a media defendant in a defamation case where the publisher and its employees exercised considerable care and expended much time and energy in researching and editing to achieve accuracy, and where the record plainly demonstrated that plaintiff made no showing whatever of constitutional "actual malice".

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OPINIONS BELOW

In its citations to the opinions and judgment below, the Petition for a Writ of Certiorari (pp. 2-3) neglects to include the order of the Court of Appeals of November 23, 1982 denying the plaintiff-appellee's petition for rehearing. This brief order is set forth below:

> The petition for rehearing is denied. As to the issue of "actual malice," the appellee misreads and mischaracterizes our opinion. We did not focus on the state of mind of the editorial staff; we focused on the state of mind of Seligson (author) and the editorial

staff which reviewed and modified Seligson's report.

As to the second point raised by appellees, we think the standard of review as set forth on page 12 of the slip opinion is correct and was properly applied.

STATEMENT OF THE CASE

This is a product disparagement suit brought against Consumers Union of United States, Inc. (hereinafter "respondent", "Consumers Union", or "CU"), the well-known, highly respected not-for-profit independent consumer testing organization, which for more than

forty-five years has published the monthly magazine, CONSUMER REPORTS.[1]

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[1] At present, CU has approximately one hundred thousand individual members, and the magazine CONSUMER REPORTS enjoys a circulation of approximately 2.7 million. Over the years, CU has earned a widely respected and well-deserved reputation for accuracy and integrity, a fact which has been recognized by the courts. See Consumers Union of United States, Inc. v. Theodore Hamm Brewing Co., Inc., 314 F.Supp. 697, 698, 700 (D. Conn. 1970); In re Consumers Union of United States, Inc., 7 Med. L. Rptr. 2038, 2039 (S.D.N.Y. 1981) (CONSUMER REPORTS is a "public service publication which advances a primary First Amendment objective by providing a public forum for impartial discussion of the safety, fitness for use and reliability of products offered to the consuming public.")

The petitioner, Bose Corporation (hereinafter "petitioner" or "Bose"), alleged, inter alia, that its 901 Series I stereo loudspeaker was disparaged in an article entitled "Loudspeakers" appearing in the May 1970 issue of CONSUMER REPORTS. The facts underlying the case were set out in the opinions of the Court of Appeals(App.X2-8, 30-34)[2] and the District Court's liability decision (App.X40-60, 65-66, 94-100, 138-143). A fair synopsis of the events leading to the filing of this petition follows.

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[2] References to pages in the Appendix to the Petition are designated "App.X__". References to pages in the Appendix in the Court of Appeals are designated "A__".

The research and editing procedures that led to CU's publication of the disputed article began in early 1969; they were lengthy and involved many Consumers Union personnel and numerous internal checks and reviews(App.X65-66, A11, A112-A113, A140-A141, A201-A202). Each of the 24 speakers evaluated was subjected to an extensive battery of scientific tests and measurements which took several months to complete. The tests were designed to measure both the objective electrical and acoustical output of the loudspeakers and the more subjective, psychoacoustical aspects of their performance (A475-A476). Each

model tested was put through the same test protocol; two additional tests were devised to evaluate the special claims made for the Bose 901 and one other speaker of unconventional design (App.X59-60, A477-A478).

The tests were conducted and supervised by Arnold L. Seligson, then CU's Senior Project Engineer in charge of testing loudspeakers and other audio products, assisted by a project engineer, Alan Lefkow, two assistant project engineers, and a statistician(App.X56, A112-A113). Seligson and Lefkow, who both testified at trial, are extremely

capable engineers, highly skilled, experienced and expert in the testing and evaluation of loudspeakers(App.X30, 50-52).

Upon completion of the testing in January 1970, Seligson and Lefkow prepared a draft of the "Report to Editorial" -- a lengthy document intended for Consumers Union's editorial department which summarized in lay language the tests and their results. The sections of the draft referring to the Bose 901 were written by Seligson and reviewed by Lefkow(App.X65). The draft was reviewed by their superiors, revised, and the

revision widely circulated within Consumers Union(App.X66).

Using the Report to Editorial, a professional writer in Consumers Union's editorial department prepared a draft manuscript of the article (A12, A202). The draft and each subsequent revision and galley proof were circulated to and reviewed for accuracy by Seligson, Lefkow, their superiors and others in several departments of Consumers Union until the article was finally approved for publication(A147, A202).

From the moment of publication through the trial ten years later Bose claimed there were "numerous factual errors" -- all of them alleged to be damaging -- in the seven paragraphs of the article relating to the Bose 901 (A13). Bose sued Consumers Union for product disparagement, violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1974), and unfair competition.

The District Court severed the issues of liability and damages and held two non-jury trials. At the liability trial before Senior Judge Julian, Bose

offered but one witness, the founder, principal owner, chief executive officer and namesake of the plaintiff, Dr. Amar G. Bose. His testimony was largely unsubstantiated and conclusory. Bose presented no evidence of any objective tests or measurements of the Bose 901 that it or any one else made to demonstrate the falsity of Consumers Union's review.

Consumers Union on the other hand introduced a mountain of objective testimony, independent test data, expert testimony and other telling proof in support of the truth of the statements

challenged by Bose and the care taken in the testing and editorial process to attain a fair and accurate evaluation.

After 19 days of trial, Judge Julian found for Consumers Union on all claims save one. The Lanham Act and unfair competition claims were dismissed and four statements alleged to be disparaging were held either not proven false or not shown to be defamatory.

The District Court held only one portion of one phrase in the article to be false -- and only by a preponderance of the evidence. That isolated

fragment, "individual instruments heard through the Bose system ... tended to wander about the room," the Court found to be untrue because Consumers Union engineers testified that they heard "wandering sounds" only "within a few feet of the wall near which the Bose 901 loudspeakers were placed."(App.X101, footnote omitted). The difference between "tended to wander about the room" and "tended to wander about [or along] the wall" the Court found to be both false and disparaging.

Judge Julian than determined that Bose met the tests ehunciated by the

First Circuit in Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) and was a "public figure at least with respect to the limited issues of the characteristics and quality of the Bose 901" (App.X132-133).[3] Accordingly, the rules of New York Times v. Sullivan, 376 U.S. 254 (1964), were held to apply.

Nonetheless, the District Court found that the disputed fragmentary phrase was published with "actual malice"(App.X143).

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[3] Bose conceded this finding on appeal and the Court of Appeals accepted the finding for purposes of the appeal (App.X21).

It did so without the benefit of any evidence, objective or subjective, upon which constitutional malice could be based. The Court misapplied applicable law and inferred malice solely from its finding of falsity. CU's highly professional research, testing, writing and editing procedures (all followed in a concern to publish accurate judgments) and its consistently professed belief that what was written was true were ignored by the District Court. Instead, falsity plus the author's intelligence were held to create actual malice. In

the Court's words, Consumers Union's chief test engineer

> is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its plain, ordinary meaning(App.X142).

Next followed the trial on the issue of damages. Chief Judge Caffrey assessed damages in the amount of $115,296.00 plus interest and costs of $95,609.24, a total of $210,905.64 (App.X200-201). Based only upon hearsay assertions of a general decline in growth of sales (sales continued to increase

after the article's publication) and awarding compensation for critical but non-actionable portions of the article, this finding was plain error of constitutional dimension.[4]

Consumers Union's appeal to the First Circuit raised numerous questions of error in both the liability and damages holdings.[5] Because it could find

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[4] Because it reversed on issues of liability, the Court of Appeals did not review the damages findings.

[5] The assertions of error included, inter alia, the following: The comment is a statement of opinion which is absolutely privileged; if considered factual
(Footnote Continued on Next Page)

no evidence of actual malice, let alone clear and convincing proof, the Court of Appeals did not consider CU's principal claims of truth and nonactionable opinion. Assuming arguendo a false statement of fact (even though the court noted "... we are not sure that the statement that instruments tended to wander about the room is false" App.X19), the First Circuit independently reviewed the record for facts that would provide evidence

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(Footnote Continued from Previous Page)

the phrase is true; even if false, the statement is not defamatory; Bose was required to prove falsity with convincing clarity and not merely by a preponderance of the evidence; even if false and defamatory, the statement was not made with actual malice; and Bose did not properly prove special -- or any -- damages.

of "negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice"(App.X28). Since no such evidence existed, none was found (App.X28).

The Court remarked upon the similarities in preparation between the article in this case and that at issue in the case of Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 839 (1980)[6]. The First Circuit further

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[6] In Yiamouyiannis, the Second Circuit reviewed CU's work in preparing a series of articles on the fluoridation controversy and stated:
(Footnote Continued on Next Page)

noted that CU followed its normal editorial procedures here; that in

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(Footnote Continued from Previous Page)

> It is clear that [Consumers Union], through its agents, made a thorough investigation of the facts. Scientific writings and authorities in the field were consulted; authoritative scientific bodies speaking for substantial segments of the medical and scientific community were investigated. The unquestioned methodology of the preparation of the article exemplifies the very highest order of responsible journalism: the entire article was checked and rechecked across a spectrum of knowledge and, where necessary, changes were made in the interests of accuracy.

619 F.2d at 940.

carrying out the more difficult task of performing original research CU used expert and experienced evaluators; and that to find actual malice on the facts of "this case would be to interpret that concept to require little more than proof of falsity, an interpretation that Justice Goldberg expressed fears about in his concurrence in New York Times v. Sullivan."(App.X36).

In carrying out its review of the record below, the First Circuit properly followed the standards mandated by an undeviating succession of cases in

this Court, [e.g., New York Times v. Sullivan, 376 U.S. 254, at 285, n.26; Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), and Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54, (1971)]:

> In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead, we must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof [citations omitted]. At the same time, we recognize that we are in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact.

(App.X22-23).

Disputing the First Circuit's adherence to the constitutionally-required standard of review, Bose petitioned that Court for rehearing. After the rehearing application was denied, Bose filed this petition for certiorari.

The decision of the First Circuit was eminently correct. It should not be disturbed by this Court and the petition should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

There can be no question that, on the record before it, the Court of Appeals was plainly correct in reversing the District Court and finding for Consumers Union. Bose's petition borders on the frivolous and meets none of the considerations set forth in U.S. Sup. Ct. R. 17, 28 U.S.C.A.

This Court has unswervingly held that in public-figure defamation cases reviewing courts must make an independent examination of the entire record to assure that the judgment below does not trample improperly upon consti-

tutionally protected speech. No court has ever held otherwise and Bose's assertions to the contrary are based on blind or intentional misconstruction.

This case does not warrant further expenditure of judicial time and energy.

1. This Court and All Others Unanimously Require an Apellate Court to Conduct an Independent Review of the Record in a Public-Figure Defamation Action.

Bose's contention that appellate review of public-figure defamation actions is limited by the "clearly erroneous" rule of Fed. R. Civ. P. 52(a) deliberately ignores the long and unbroken

line of Supreme Court decisions calling for independent appellate review in such cases.

The landmark case of New York Times v. Sullivan, 376 U.S. 254, 285 (1964), made it abundantly clear that in reviewing a libel case, because of the First Amendment concerns which permeate such cases, an appellate court's

> duty is not limited to the elaboration of constitutional principles; [it] must also in proper cases review the evidence to make certain that those principles have been constitutionally applied....We must 'make an independent examination of the whole record,' ... so as to assure ourselves that the judgment does not

> constitute a forbidden intrusion on the field of free expression.

376 U.S. at 285 [Citation and footnote omitted.]

Again, in Time, Inc. v. Pape, 401 U.S. 279, 284, (1971), this Court referred to the "settled principle" that

> '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.'... [W]e have frequently had occasion to review 'the evidence in the ... record to determine whether it could constitutionally support a judgment' for the plaintiff. [Citations omitted]

And, in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, (1971), the plurality stated plainly that independent appellate review of constitutional facts is not merely permissive but is a constitutional requirement.

> Clearly, then, this Court has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.'... The simple fact is that the First Amendment question of 'constitutional fact' compel this Court's de novo review.

403 U.S. at 54 (Citations omitted).

A leading commentator on the law of defamation has reviewed this Court's opinions on the issue and concluded:

> As a matter of constitutional law the judiciary has an expanded role in the fact-finding process in [cases involving First Amendment rights]. Trial and appellate courts are required to review the facts for themselves and to test them against the constitutional standard.
>
> The duty of the court [is] to reconsider the facts elicited below to assure that constitutional principles have properly been applied ..., a reviewing court is required to determine for itself that the jury verdict below is based upon a proper finding of publication

> with knowledge of falsity or subjective awareness of probable falsity proved with 'convincing clarity' by competent evidence. Otherwise, as a matter of constitutional law, the reviewing court cannot permit the verdict to stand.

R. Sack, Libel, Slander and Related Problems, 538, 560 (1980) (citations omitted); see also Oakes, Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma, 7 Hofstra L. Rev. 655 (1979).

The foregoing authorities underscore the correctness of the standard of review applied by the Court of Appeals. Not a single case which Bose

cites (Pet. pp. 24-29) undermines these holdings or points toward a different result. None is a defamation or disparagement suit; none directly implicates the First Amendment in a relevant context; and none provides even the slightest suggestion that this Court has altered the independent review requirements of New York Times and its progeney.

Bose's bald assertion that the decision below conflicts with prior decisions of this Court is meritless to the point of being disingenuous.

Petitioner's citation of Cher v. Forum International, 692 F.2d 634

(9th Cir. 1982), is likewise wholly inapposite and presents no departure from this Court's mandated standard of independent review. Nowhere in that case did the Ninth Circuit hold that it was limited by Fed. R. Civ. P. 52(a) in its review of the First Amendment claim there in issue.

Quite the opposite. The Ninth Circuit stated

> **Because of the First Amendment implications in this case, we have examined the trier's findings with the extra care required in such cases.**

Id. at 640.

The cases are legion[7] and unanimous that an appellate court reviewing a judgment in a defamation case brought by a public figure against a media defendant must undertake an independent review of the record to assure proper application of First Amendment principles to the facts.

The First Circuit properly discharged this constitutional obligation.

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[7] See, e.g., New York Times v. Sullivan, 376 U.S. 254, 285 (1964); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 11 (1970); Time, Inc. v. Pape, 401 U.S. at 284; Rosenbloom v. Metromedia, 403 U.S. 54 (1971); Buckley v. Littell, 539 F.2d 882, 888 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977).

Bose's assertion that the First Circuit improperly overturned credibility findings of the trial judge likewise miscontrues the facts and the governing legal principles. The Court of Appeals properly recognized the District Court's finding of actual malice as nothing more than an inference based on the alleged falsity alone(App.X36). In so holding, the appeals court did not dispute any true credibility or demeanor finding of the District Court Judge.

Actual malice was premised by District Judge Julian solely upon a misapplication of the law to the facts in the record, an error manifestly not

limited by Rule 52. See Inwood Laboratories, Inc. v. Ives, ____ U.S. ___, 102 S. Ct. 2182, 2189 n.15, 72 L.Ed. 2d 606, 616 n.15 (1982).

The reversal by the Court of Appeals was based on the District Court's clearly erroneous holding that the use of "imprecise" or even "false" language, without more, was sufficient to sustain a finding of actual malice. The First Circuit correctly held that the Constitution prohibits such a result for it would deprive the press of the protection of the actual malice standard altogether and thereby render meaningless the First Amendment shield provided by New York

Times v. Sullivan. See Garrison v. Louisiana, 379 U.S. 64, 79 (1964); St. Amant v. Thompson, 390 U.S. 727, 730-731 (1968); Time, Inc. v. Pape, 401 U.S. at 289-292; Loeb v. New Times Communications Corp., 497 F. Supp. 85, 93 (S.D.N.Y. 1980); National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996 (1979), cert. denied, 446 U.S. 935 (1980).

As the First Circuit was plainly correct in following the standard of independent review dictated by this Court in New York Times, and there is

not an iota of evidence in the record to sustain a finding of actual malice, the petition for certiorari should be denied.

2. The Petition Should be Denied in Any Event Because Numerous Other Issues in the Case Which were Not Resolved by the Appellate Court Require Reversal of the District Court's Decision

Consumers Union's appeal to the First Circuit challenged several distinct holdings of the District Court as error. The appellate court focused on and decided but one issue: whether, assuming the fragment at issue was factual (as

opposed to opinion) and further assuming it was false, the evidence supported a finding of actual malice.

It is significant, however that the appellate court expressed doubts that the statement was in fact false; the court merely assumed falsity arguendo (App.X19-20). It also made no finding that the statement was actually an expression of fact rather than opinion; again, it merely postulated that it was(App.X19-20). Nor did the First Circuit address CU's argument that a libel plaintiff must prove falsity with clear and convincing proof, not merely by a preponderance of the evidence as the

District Court held(App.X20n.8). And because it reversed the finding of liability, the Court of Appeals never ruled on the constitutional and common law errors committed by the District Court in awarding the plaintiff over $200,000 in damages, absent proof of proper special damages and without requiring Bose to show that any losses were a result of the single statement held to be actionable.

Thus even were the writ to be granted, this twelve-year old litigation would not finally be concluded; many other complicated issues of critical

importance to First Amendment jurisprudence would remain to be resolved.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Michael N. Pollet
Marshall Beil
Carol A. Schrager
KARPATKIN POLLET PERLMUTTER & BEIL
708 Third Avenue
New York, New York 10017
(212) 557-4700
Attorneys for Respondent CONSUMERS UNION OF UNITED STATES, INC.